

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 December 2004**

Case No. 2003-BLA-5737

In the Matter of:

JERRY BAKER  
Claimant

v.

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS  
Party-in-Interest

**APPEARANCES:**

John Hunt Morgan, Esquire  
For the Claimant

Phillip Giannikis, Esquire  
For the Director

BEFORE: JOSEPH E. KANE  
Administrative Law Judge

**DECISION AND ORDER—DENYING BENEFITS**

This case arises from a claim for benefits under the “Black Lung Benefits Act,” Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter referred to as “the Act”), and applicable federal regulations, mainly 20 C.F.R. Parts 412, 718, and 727 (“Regulations”).

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as black lung.<sup>1</sup>

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<sup>1</sup> The following abbreviations are used in this decision: DX = Director’s exhibit; CX = Claimant’s exhibit; ALJ 1 & 2 = Administrative Law Judge Black Lung Benefits Act Evidence Summary Forms on behalf of the Claimant and Director, respectively; Tr. = Transcript of the hearing; BCR = Board-certified radiologist; and B = B-reader of x-rays.

At a formal hearing held on October 8, 2003 in Hazard, Kentucky, all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and Regulations issued thereunder, found in Title 20, Code of Federal Regulations.<sup>2</sup> The parties declined the opportunity to submit closing arguments and the record is now closed. Tr. 26.

At the hearing, the Director's exhibits 1-20, ALJ 1 & 2, and Claimant's exhibits 1-2 were admitted into evidence. Tr. 5-10.<sup>3</sup> In addition, a document titled, "Permanent Impairment Due to Respiratory Disorders" was marked as Director's exhibit 21 and admitted into evidence without objection. Tr. 10-11.

### ISSUES

The following issues remain for resolution:

- (1) Whether the miner is totally disabled;
- (2) Whether the miner's disability is due to pneumoconiosis.

(DX 20, Tr. 11)

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Procedural History and Factual Background<sup>4</sup>

Claimant, Jerry Baker, filed a claim for benefits on June 23, 1994. (DX 1) Administrative Law Judge Thomas F. Phalen initially denied the claim by Decision and Order dated April 28, 1999. Claimant appealed and the Benefits Review Board affirmed Judge Phalen's decision on May 3, 2000. (DX 1) Subsequently, Claimant filed a petition for modification on February 8, 2001, and then requested the claim be withdrawn on April 23, 2001. The District Director granted Claimant's request for withdrawal in an order dated April 23, 2001. (DX 1) The claim was withdrawn and is considered to not have been filed, pursuant to 20 C.F.R. § 725.306. (DX 1)

Claimant filed his current claim for benefits on June 11, 2001. (DX 3) The District Director denied the claim by Proposed Decision and Order on February 19, 2003, because

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<sup>2</sup> The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80, 107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The Director objected to Claimant's exhibit 1 on the basis that Dr. Baker discussed respiratory results that lacked tracings as required by the regulations. The objection was noted and is discussed in the Conclusions of Law set forth below.

<sup>4</sup> Given the filing date of this claim, subsequent to the effective date of the permanent criteria of Part 718 (i.e., March 31, 1980), the regulations set forth at 20 C.F.R. Part 718 will govern its adjudication. Because the miner's last exposure to coal mine dust occurred in Kentucky, this claim arises under the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit. See *Broyles v. Director, OWCP*, 143 F.3d 1348, 21 BLR 2-369 (10<sup>th</sup> Cir. 1998).

Claimant failed to show he was totally disabled due to pneumoconiosis. (DX 18) Claimant requested a formal hearing on February 27, 2003, and the case was referred to the Office of Administrative Law Judges on April 18, 2003. (DX 19, 20) A hearing was held on October 8, 2003 in Hazard, Kentucky.

At the hearing, Claimant testified that he is 50 years old, is six feet tall, and weighs 230 pounds. Tr. 12. Claimant has been married to his wife, Betty, for 30 years and he does not have any dependent children. Tr. 12-13. Claimant stated that he graduated from high school and has vocational training in machine repair. Tr. 13. Claimant testified that he worked for approximately 18 ½ years in the coal mines. *Id.* He testified that he worked about three years at the surface and about fifteen years underground. Tr. 13-14. Claimant explained that even when he worked on the surface, he was required to go underground and work. Tr. 14. He testified that Blue Diamond Coal Company was his only employer. *Id.*

Claimant testified that he worked as a mine machine repairman, which required heavy lifting up to 100 pounds. *Id.* Claimant explained that when he worked underground, the lowest seam of coal he went into was 29 inches high, which required crawling. Tr. 15. Claimant testified that the underground coal mines were extremely dusty and he would have to dust off his clothes and wipe his face with a rag before going home. Tr. 16. He further testified that the face of the mine was dustier because that is where the equipment was running. Tr. 17.

Claimant stated that his treating physician is Dr. Glen Baker and that he is using an Albuterol inhaler approximately three times per day and takes other medicine for his breathing. Tr. 17-18. He explained that he uses the inhaler to help his breathing. Tr. 24. Claimant testified that hot, humid weather bothers him. Tr. 19. Claimant stated that he smothers, coughs, and wheezes a lot—even at night—and that he sleeps on two or three pillows because if he lays down flat, he smothers “real bad.” Tr. 19. Claimant stated that he has episodes of dry cough or wheezing a couple of times a day and does not feel he could return to any of his prior mining jobs. Tr. 19-20. He considers himself to be totally disabled for any type of employment. Tr. 20.

Claimant testified that he never smoked and leads a sedentary life, watching TV and visiting his brother. Tr. 21-22. Claimant stated that at his pulmonary evaluations with Drs. Baker and Hussain, he cooperated fully and put forth his best effort. Tr. 22. Claimant testified that he has not been diagnosed with asthma. Tr. 25.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They are also based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties was carefully reviewed and considered. While the contents of certain medical evidence may appear consistent with the conclusions reached herein, the appraisal of such evidence was conducted in conformance with the quality standards of the regulations. Where pertinent, I have made credibility determinations concerning the evidence.

## Medical Evidence<sup>5</sup>

### X-Ray Reports<sup>6</sup>

The record contains the following chest x-ray evidence:

<u>Exhibit No.</u>	<u>Date x-ray</u>	<u>Physician/Qualifications</u>	<u>Interpretation</u>
DX 11	2/7/01	Baker	1/0. Film quality = 1.
DX 8	8/24/01	Sargent/BCR, B	Read for quality only =1.
DX 8	8/24/01	Hussain	1/2. Film quality = 1.

### Pulmonary Function Studies<sup>7</sup>

The record contains the following pulmonary function study evidence:

<u>Ex. No./ Date</u>	<u>Coop./ Undst/<sup>8</sup></u>	<u>Age / Height<sup>9</sup></u>	<u>FEV1</u>	<u>MVV</u>	<u>FVC</u>	<u>FEV1/FVC%</u>	<u>Qualify?</u>	<u>Tracings</u>
DX 11/ 2/7/01	Good/ Good/	47/ 71 3/4"	3.56	123	4.43	----	No	Yes
DX 8/ 8/24/01	Fair/48/ Fair/72"		3.00	63	3.68	81.5%	No	Yes

\* Results obtained after bronchodilator

<sup>5</sup> Both parties' Black Lung Benefits Act Evidence Summary Form, which appear in the record as ALJ 1 and ALJ 2, list the results of an October 10, 2001 chest x-ray, pulmonary function study, and arterial blood gas study. These tests appear in the record at DX 10. However, the records are actually for another claimant whose name is on the test results. The records were apparently misfiled and placed into Mr. Baker's file. Accordingly, this evidence will not be considered in this decision.

<sup>6</sup> A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a)-(b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated, wherein the miner may be presumed to be totally disabled due to the disease.

<sup>7</sup> The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1, as well as the MVV or FVC, must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

<sup>8</sup> Claimant's cooperation and understanding are not indicated on the reporting sheets utilized by Dr. Baker during his examination on February 7, 2001. However, at the hearing, Claimant testified that he put forth his best effort during the tests with Drs. Baker and Hussain. Tr. 22.

<sup>9</sup> I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). I find that Claimant's height is 71.87".

### Arterial Blood Gas Studies<sup>10</sup>

The record contains the following arterial blood gas study evidence:

<u>Ex. No.</u>	<u>Date</u>	<u>pO2</u>	<u>PCO2</u>	<u>Qualify?</u>
DX 11	2/7/01	94	31	No
DX 8	8/24/01	82 *109	38.5 *31.6	No

\* Results obtained with exercise

### Medical Reports

#### Hospitalization Records and Treatment Notes

The record contains the miner's treatment reports from Dr. Glen Baker and a report by George Chaney. Dr. Baker's report appears in the record at DX 12 and CX 1 and Dr. Chaney's report appears at DX 13. As a preliminary matter, the "treatment report" of Dr. Chaney is not, in fact, a treatment report, but is instead a medical opinion report addressing whether the miner suffers from coal workers' pneumoconiosis and whether he is disabled by his pneumoconiosis. As such, it exceeds the scope of evidence allowed under the regulations pursuant to 20 C.F.R. § 725.414(a)(2)(i). This section provides, in pertinent part, "The claimant shall be entitled to submit, in support of his affirmative case, no more than two... medical reports." *Id.* As Claimant chose to submit the two medical reports of Dr. Baker,<sup>11</sup> the report of Dr. Chaney exceeds the limitation on the submission of medical evidence. However, as I noted above in footnote five, the October 10, 2001 medical records at DX 10 and ALJ 1 & 2 were the misfiled results for another claimant and were stricken from this record. Therefore, I will allow Dr. Chaney's report to be considered as a second medical report for Claimant.

The progress notes from the miner's bi-monthly visits to Dr. Baker, beginning in May 2001 through April 2002, are in the record. (DX 12) The handwritten portion of the notes is illegible but indicate that the miner was seen for follow-up of coal workers' pneumoconiosis and chronic bronchitis. The record also contains a letter from Dr. Baker dated December 31, 2002. (CX 1) Dr. Baker stated that he treated Claimant for the prior 1 ½ years for chronic obstructive airway disease, coal workers' pneumoconiosis, and chronic bronchitis. He explained that the miner recently had an acute exacerbation of his obstructive airway disease and his pulmonary function study revealed a vital capacity of 55% and FEV 1 of 38%. Dr. Baker stated that following two weeks of corticosteroids, the miner's vital capacity was 53% and FEV1 was 45%. Dr.

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<sup>10</sup> Arterial blood gas studies are performed to detect impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

<sup>11</sup> See ALJ 1, "Black Lung Benefits Act Evidence Summary Form."

Baker noted that the miner continues to have difficulty with cough, sputum production, wheezing, and shortness of breath. He stated that the miner was placed on Prednisone and that a chest x-ray on December 20, 2002 showed the continued presence of coal workers' pneumoconiosis, Category 1/0, based on the 1980 ILO classification.

### Narrative Medical Evidence

#### Dr. Glen Baker

Dr. Baker examined the miner on February 7, 2001 and his report appears in the record at DX 11. He recorded that the miner worked 18 ½ years in underground mines as a repairman and electrician and last worked in 1991. He noted that the miner was never a smoker and had no other employment. He recorded the miner's chief complaints as difficulty breathing for up to fifteen years, difficulty at night with cough, wheezing, shortness of breath, and variable sputum production practically every night. Dr. Baker noted that the miner sleeps on two pillows in order to alleviate the symptoms, and his breathing is aggravated by exertion, changes in the weather, exposure to hot and humid weather, and any type of dust, odor, or fume. He noted that the miner cannot walk more than a hundred yards on level ground before he has to stop and catch his breath. In an attachment, Dr. Baker noted that the miner has no history of TB, asthma, pneumonia, or hemoptysis, and he is on inhalers to help alleviate his symptoms to some extent.

Dr. Baker's physical exam recorded a blood pressure of 144/90, pulse 80 beats per minute, weight of 224 ¾ pounds and height 182 cm. Lungs were clear with no rales or wheezes noted, and extremities were without cyanosis, clubbing, or edema. Dr. Baker administered objective tests consisting of a chest x-ray, pulmonary function test, and arterial blood gas study, the results of which are set forth above.

Dr. Baker stated that the miner has a Class 1 impairment based on the FEV 1 and FVC being greater than 80% predicted. He based this opinion on Table 5-12, Page 107, Chapter Five, and "Guides to the Evaluation of Permanent Impairment, Fifth Edition."<sup>12</sup> Dr. Baker stated that the miner also has a second impairment based on the presence of pneumoconiosis. He noted that this opinion is also based on the above "Guides to the Evaluation of Permanent Impairment" at Section 5.8, which states that a person who develops pneumoconiosis should limit further exposure to the offending agent and this suggests that the miner is 100% occupationally disabled for further coal dust exposure.

Dr. Baker's diagnoses were: 1) Coal workers' pneumoconiosis, Category 1/0, on basis of ILO Classification, based on abnormal x-rays and significant history of exposure; 2) Bronchitis based on history. Dr. Baker opined that the miner's disease is the result of his exposure to coal dust, because the miner has abnormal x-rays and significant history of dust exposure and no other condition to account for these x-ray changes. He further opined that any pulmonary impairment is the result of exposure to coal dust, as the miner was never a smoker and has x-ray

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<sup>12</sup> This table appears in the record at DX 21.

evidence of pneumoconiosis. He stated that, "it is felt that any pulmonary impairment is caused, at least in part, if not significantly so, to his coal dust exposure and associated pneumoconiosis."

#### Dr. Imtiaz Hussain

Dr. Hussain examined the miner at the request of the Department of Labor and completed Form CM-988, which appears in the record at DX 8. Dr. Hussain recorded a family history positive for high blood pressure in the miner's parents, heart disease in his mother, and cancer in both parents. He noted that the miner's medical history was positive for arthritis and high blood pressure. He noted that the miner suffered from chronic spondylosis??? backache, and was hospitalized for chest pain five years prior. Dr. Hussain noted that the miner never smoked and did not abuse alcohol.

Dr. Hussain recorded the miner's chief complaints as daily sputum production, daily wheezing, daily dyspnea, and daily cough. The miner's physical exam was essentially normal. Dr. Hussain administered objective tests consisting of a chest x-ray, ventilatory study, arterial blood gas study, and an EKG, which was normal. Dr. Hussain's cardiopulmonary diagnosis was pneumoconiosis that he attributed to dust exposure. Dr. Hussain recorded the miner's impairment as a mild impairment. Dr. Hussain based his diagnosis on the miner's chest x-ray findings and history of exposure, and he categorized the miner's pulmonary impairment as mild. Dr. Hussain attributed the miner's impairment to pneumoconiosis and indicated that the miner does retain the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment.

#### Dr. George R. Chaney

Dr. Chaney submitted a medical opinion dated June 10, 2002, which appears in the record at DX 13. Dr. Chaney indicated that he has treated the miner over the past fifteen years and his diagnoses are cervical disc disease, carpal tunnel syndrome, anxiety neurosis, (illegible), COPD, and coal workers' pneumoconiosis. He noted that clinical findings, laboratory and pulmonary function tests show abnormal examination, abnormal chest x-ray, and abnormal pulmonary function tests. Dr. Chaney identified the miner's symptoms as shortness of breath, orthopnea, chest tightness, wheezing, episodic acute bronchitis, fatigue, palpitations, and coughing. Dr. Chaney indicated that it is his opinion that the miner suffers from a pulmonary disease caused, at least in part, by exposure to coal dust based upon history, examination, chest x-ray, and pulmonary function tests. Dr. Chaney opined that the miner suffers from a pulmonary impairment that is related to coal workers' pneumoconiosis. He indicated that the miner does not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment due to the nature of his illness.

### Conclusions of Law

#### Length of Coal Mine Employment

The parties' agree that the miner was a coal miner within the meaning of the Act for at least 16 years. (DX 20)

### Date of Filing

Claimant filed his claim for benefits under the Act on June 11, 2001. (DX 3)

### Responsible Operator

The Black Lung Trust Fund will provide payment of any benefits awarded to Claimant. (DX 1)

### Dependents

Claimant has one dependent for purposes of augmentation of benefits, his wife, Betty. Tr. 12.

### Evidence of Total Disability

Claimant's claim was denied because he failed to prove that he is totally disabled due to pneumoconiosis. Total disability is defined as pneumoconiosis that prevents or prevented a miner from performing his usual coal mine employment or other comparable gainful work. 20 C.F.R. §§ 718.305(c), 718.204(b)(1). A finding of total disability may be based on criteria found in § 718.204(b)(1), which provides that a miner will be considered totally disabled if the irrebuttable presumption set forth in § 718.304<sup>13</sup> applies, or may be established by criteria found in § 718.204(b)(2), which consists of qualifying pulmonary function studies, qualifying blood gas studies, the existence of cor pulmonale with right-sided congestive heart failure, and the opinion of a physician, exercising sound medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concluding that the miner's pulmonary condition prevents him from performing his usual coal mine work.

Because the record contains no x-ray readings recording large opacities, the irrebuttable presumption at § 718.304 does not apply to this claim for benefits.

The record contains two pulmonary function studies, neither of which produced qualifying values. Thus, Claimant has not established total disability via pulmonary function studies.

The record also contains the results of two arterial blood gas studies. Counsel for the Director objected to Dr. Baker's pulmonary function study report and medical opinion because the study lacked three tracings. Tr. 9. After reviewing the record, it appears as though copies of three tracings are contained therein, albeit not clear ones. While I will overrule counsel's objection, I note that neither of the studies produced qualifying results. Therefore, Claimant has not established total disability via the arterial blood gas study evidence.

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<sup>13</sup> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if a chest x-ray yields one or more large opacities (greater than 1 centimeter) and would be classified as Category A, B, or C as further specified in the Regulation.



No evidence in the record suggests that the miner suffers from cor pulmonale with right-sided congestive heart failure; therefore, he has not established total disability by § 718.204(b)(2)(iii).

The miner may also establish total disability by the reasoned medical opinion of a physician. 20 C.F.R. § 718.204(b)(2)(iv). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, and the claimant bears the burden of establishing by a preponderance of the evidence the existence of the element. *Mazgaj v. Valley Camp Coal Co.*, 9 BL.R. 1-201, 1-204 (1986). A physician who compares the exertional requirements of the miner's usual coal mine employment against his physical limitations may make a finding of total disability. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6<sup>th</sup> Cir. 2000).

There are three narrative medical reports in the record. Dr. Baker stated that the miner has a Class 1 impairment based on the FEV 1 and FVC being greater than 80% predicted. He based this opinion on Table 5-12, Page 107, Chapter Five, "Guides to the Evaluation of Permanent Impairment, Fifth Edition." Dr. Baker stated that the miner also has a second impairment based on the presence of pneumoconiosis. He noted that this opinion is also based on the above "Guides to the Evaluation of Permanent Impairment" at Section 5.8, which states that a person who develops pneumoconiosis should limit further exposure to the offending agent and this suggests that the miner is 100% occupationally disabled for further coal dust exposure.

Dr. Chaney opined that the miner has a respiratory impairment related to coal workers' pneumoconiosis and does not have the respiratory capacity to perform the work of a coal miner or similar work.

Dr. Hussain opined that the miner has a mild impairment but retains the respiratory capacity to return to coal mine employment or similar work.

All three physicians based their opinions on the miner's medical and social histories, objective tests, and physical examinations. None of them, however, discussed their opinions in relation to the exertional requirements of Claimant's individual coal mine job. Moreover, neither Dr. Hussain nor Dr. Chaney indicated that they were aware of what type of work the miner performed, in what part of the mine he performed it, or what amount of coal dust he was exposed to. Therefore, I find their opinions to be entitled to little weight. Dr. Baker also does not discuss the miner's impairment in terms of the exertional requirements of his particular job, but merely states that according to the literature, a person with pneumoconiosis should not be further exposed to coal dust. Because none of the physicians based their opinions on the exertional requirements of Claimant's coal mine employment, I accord them little weight.

Weighing all the evidence pertaining to total disability together, I find that Claimant has not established by a preponderance of the evidence that he is totally disabled pursuant to 20 C.F.R. § 718.204(b). Moreover, as Claimant has not established that he is totally disabled, he cannot establish that he is totally disabled due to pneumoconiosis.

### Entitlement to Benefits

Claimant failed to establish he is totally disabled, which is an essential element of entitlement. Therefore, he is not entitled to benefits under the Act.

### Attorney's Fees

The award of attorney's fees under the Act is permitted only in cases in which the claimant is entitled to the receipt of benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

### **ORDER**

IT IS ORDERED that the claim of Jerry Baker for black lung benefits under the Act is hereby DENIED.

A

JOSEPH E. KANE  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this Decision and Order was filed in the Office of the District Director, by filing a notice of appeal with the *Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601*. A copy of a notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.